RECORD AND BRIEFS

No. 14-15

Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD ARMSTRONG and LISA HETTINGER,

Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC.; INCLUSION, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC.; and LIVING INDEPENDENTLY FOR EVERYONE, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

I. Introduction

Medicaid is "designed to advance cooperative federalism." *Wisconsin Dep't of Health & Family Svcs. v. Blumer*, 534 U.S. 473, 495 (2002), *citing Harris v. McCrae*, 448 U.S. 297, 308 (1980). Within Medicaid's "basic requirements," states are the "first-line administrators" of the program and may "select dramatically different levels of funding and coverage, alter and experiment with different financing and delivery modes, and opt to cover (or not to cover) a range of particular procedures and therapies." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2632 (2012) (Ginsburg, J., concurring in part), *quoting* Ruger, Of Icebergs and Glaciers, 75 L. & Contemp. Probs. 215, 233 (2012). The Medicaid Act conditions a state's participation in the program – and with that participation, federal funding – on, among other things, a state establishing "methods and procedures" to ensure that provider reimbursement rates are "sufficient" to enlist enough providers to provide access to quality care. 42 U.S.C. § 1396a(a)(30)(A). Idaho's reimbursement rates produced a number of providers that met that standard. At the time this case was filed, the rates had been in place for about three years, and the Centers for Medicare and Medicaid Services had not disturbed Idaho's rates.

The providers do not argue that § 30(A) confers privately enforceable rights. To avoid this obstacle, they propose an expanded theory of preemption that allows a plaintiff with Article III standing to enforce any federal statute against state officials – full stop. The argument goes that they do not need a cause of action or any enforceable rights because this is not a suit to enforce § 30(A) but rather is a suit to enforce the *Constitution* – namely the Supremacy Clause. On this premise Respondents argue that the Supremacy Clause authorizes a claim under the Court's equitable powers to enforce a federal statute against an allegedly conflicting state law.

Respondents' position suffers two primary defects. One, their position is inconsistent with several of this Court's cases, specifically *Gonzaga University v. Doe*, 536 U.S. 273 (2002), and *Alexander v. Sandoval*, 532 U.S. 275 (2001). These cases establish that without privately enforceable rights, providers may not enforce § 30(A) against state officials. Respondents' position is also inconsistent with *Maine v. Thiboutot*, 448 U.S. 1 (1980), and the other cases involving provisions of the Social Security Act (of which Medicaid is a part), which hold that § 1983 is the exclusive basis for relief against state officials under the Social Security Act's provisions. Respondents dismiss these cases as irrelevant, but their arguments cannot escape these cases' gravitational pull. The Court has not adopted the distinction Respondents urge here – that by calling a *statutory* enforcement claim a *constitutional* claim a plaintiff

may do under the Supremacy Clause what it cannot do under the statute itself. Respondents advance no legally sufficient reason why the Court should adopt that distinction now.

Two, their position urges an unsupportable theory of the Supremacy Clause and an unjustified use of this Court's equitable powers. That the Supremacy Clause resolves disputes between conflicting state and federal laws says nothing about *who* may present those conflicts. That the Court has decided many preemption cases does not mean that *anyone* can bring those cases anytime any conflict is alleged. Indeed this Court's cases do not support the claim here because the providers are not presenting a defense to or immunity from state regulation that interferes with their property or liberty rights that federal law protects. The very cases Respondents cite in their brief and its appendix demonstrate the limits of preemption they seek to eliminate.

II. Respondents May Not Maintain A Cause Of Action Under the Supremacy Clause To Enforce § 30(A) Against State Officials Because Congress Has Not Created Privately Enforceable Rights Under That Statute

1. Respondents brought this case to force Idaho to reimburse them at specific rates that they claimed were required under § 30(A). While some provisions of the Medicaid Act may establish individual rights enforceable through § 1983 or an implied right of

action, § 30(A) is not one of those provisions. Respondents skip over what § 30(A) actually does. That statute establishes "broad and general" criteria for federal money to assist states in funding their Medicaid programs. *Douglas v. Indep. Living Ctr. of So. Cal.*, 132 S. Ct. 1204 (2012). It prescribes what a state must demonstrate, and what the Secretary of the Department of Health and Human Services must find, in order to authorize that federal funding. It does not, by contrast, entitle respondents to anything. *Cf. Cannon v. Univ. of Chi.*, 441 U.S. 677, 681-82 (1979) (provision of Title IX stating that "No person shall" be discriminated against on the basis of sex by any educational program receiving federal money). The focus of § 30(A) is on "'the aggregate services provided by the State,' rather than 'the needs of any particular person.'" *Gonzaga Univ.*, 536 U.S. at 282, *quoting Blessing v. Freestone*, 520 U.S. 329, 340 (1997). These broad standards do not satisfy the requirement that for spending statutes to be privately enforceable, Congress must "'speak[] with a clear voice,' and manifest[] an 'unambiguous' intent to confer individual rights." *Gonzaga Univ.*, 536 U.S. at 280, *quoting Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 28 & n.21 (1981). *Gonzaga University* and *Sandoval* establish that without privately enforceable rights, providers may not enforce § 30(A) against state officials.

Respondents do not claim that they have enforceable rights under § 30(A) but they contend that they do not need them in order to enforce that statute

against state officials. They dismiss the Court's § 1983 and implied-right-of-action cases as "simply not relevant" to their claim because they are not enforcing the *statute*, they say, but the *Constitution*. Brief for Respondents 15 ("a suit to enforce the Supremacy Clause *is* a suit that arises directly under the Constitution."), 47. They say that individually enforceable rights are unnecessary when the suit seeks "traditional injunctive relief to enforce the Constitution," including "suits to enforce the Constitution's Supremacy Clause." Brief for Respondents 48. A plaintiff, they argue, may use the Supremacy Clause to enforce funding conditions against states and that the Court has already adopted this approach. *See* Brief for Respondents 32-33, 35-37. There are several defects with the argument and there is no reason for the Court to depart from its decisions in *Gonzaga University* or *Sandoval*, and establish a new category of statutory enforcement cases that allows any party "injured" by state law to "enforce the Supremacy Clause." *See* Brief for Respondents 7, 11.

2. This Court has said that Congressional intent to create privately enforceable rights is "dispositive." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979); *Sandoval*, 532 U.S. at 286 (intent to create remedies is "determinative"). Respondents say that it is not. Were Respondents correct, and this Court's § 1983 cases were not relevant when a plaintiff sought to enforce a statute through the Supremacy Clause when enforcement could not occur under the statute itself, those cases

would be meaningless and their attendant benefits lost. *See Indep. Living Ctr.*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) ("Indeed, to say that there is a federal statutory right enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end-run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence."). Respondents do not confront their attempted end-run and they have no answer to the structural constitutional concerns their theory presents. The Court's careful approach in examining the enforceability of federal statutes derives from separation-of-powers concerns that prevent the judiciary from treading where Congress has not intended it to go. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990). The Court rejected a nonstatutory alternative enforcement theory for precisely that reason. *Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342, 1348 (2011) (allowing a suit on a third-party beneficiary theory when the statute itself was not enforceable would render "meaningless" the absence of a right of action); *see also* Brief for United States 26 (observing that the Court's cases look to "terms and purposes of the particular statute involved, not to more general and amorphous standards drawn from elsewhere"). This is of course no less important when a statute like § 30(A), with its broad standards administered cooperatively by the expert federal agency and the states that deliver the care, is at issue. *See Gonzaga Univ.*, 536 U.S. at 292 (Breyer, J., concurring) (noting benefits of agency, rather than private enforcement when

"statute's key language is broad and nonspecific"). But Respondents do not explain why a statute that is not judicially administrable through § 1983, *see Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005), is administrable through the Supremacy Clause.

Contrary to Respondents' contentions, this Court has not adopted the position they take. They contend that the Court has allowed Supremacy Clause causes of action to enforce spending statutes in the absence of enforceable rights, but the cases they cite do not sweep as broadly as they say. As the United States points out, *Rosado v. Wyman*, 397 U.S. 397 (1970), and *California Dep't of Human Res. Dev. v. Java*, 402 U.S. 121 (1971) (cited by Respondents, *see* Brief for Respondents 35-36), both involved § 1983 claims. Brief for the United States 17 n.6. So did *King v. Smith*, 392 U.S. 309, 311 (1968); and *Townsend v. Swank*, 404 U.S. 282, 284 n.2 (1971); and *Miller v. Youakim*, 440 U.S. 125, 131 (1979); and *Shea v. Vialpando*, 416 U.S. 251, 257 (1974) (also cited by Respondents, *see* Brief for Respondents 35-36). These cases do not help Respondents because Respondents have no rights enforceable through § 1983, a point they do not contest.

Respondents also present no answer to *Thiboutot*, which observed that § 1983 was "necessarily the exclusive statutory cause of action" to enforce provisions of the Social Security Act, except to relegate it to a footnote and dismiss it as inapplicable. They say *Thiboutot* does not apply because that case

discussed the exclusive *statutory* basis for suits to enforce Social Security Act statutes and said nothing about Supremacy Clause claims. Brief for Respondents 53 n.27. But the United States points out the illogic of this argument: The Respondents' theory permits plaintiffs without enforceable rights to simply allege preemption to force a state's compliance with a statute like § 30(A). Brief for United States 27-28; *see also* Brief for Petitioners 25. Against *Gonzaga* and *Sandoval* and *Thiboutot*, the distinction Respondents advocate cannot stand.

3. Then there is the matter of congressional intent. The best evidence of congressional intent is the statute itself, but even the legislative history Respondents and their *amici* offer does not aid their arguments. Respondents posit that Congress has not intended to preclude private enforcement suits under § 30(A) and that precluding such suits would in fact *violate* congressional intent. Brief for Respondents 42-44. They essentially advocate for a default rule that unless Congress acts to preclude private enforcement of § 30(A), private enforcement is presumptively available. They make two points in support of this argument, neither of which is correct. First, whether under an implied right of action or under § 1983, the inquiries whether a statute is enforceable "overlap in one meaningful respect – in either case [the Court] must determine whether Congress *intended to create a federal right*." *Gonzaga Univ.*, 536 U.S. at 283. There is no justification for a new cause of action under the Supremacy Clause and there is no

justification for a shift in the existing requirements to enforce a federal statute.

Second, they also say that since *Rosado* Congress has shown "acceptance of Supremacy Clause actions involving Spending Clause statues over the last forty-plus years. " Brief for Respondents 42-43. But *Rosado* was a § 1983 case, and Respondents offer no other case demonstrating that Congress has accepted that the Supremacy Clause furnishes a private right of action to enforce § 30(A). Indeed, this Court has not often found Spending Clause legislation to contain enforceable rights. *See Gonzaga Univ.*, 536 U.S. at 280 ("Since *Pennhurst*, only twice have we found spending legislation to give rise to enforceable rights.").

These points aside, two legislative actions related to the Medicaid Act support the notion that Congress does not intend § 30(A) to be privately enforceable. As the United States explains, the now-repealed Boren Amendment held enforceable under § 1983 in *Wilder* required that rates were "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities. " 42 U.S.C. § 1396a(a)(13)(A) (1988). Brief for United States 30 n.11. The Boren Amendment was repealed in 1997. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507-08 (1997). A House committee report produced during the repeal of the Boren Amendment expressed intent that providers ought not be permitted to sue to challenge their reimbursement rates:

> A number of Federal courts have ruled that State systems failed to meet the test of "reasonableness" and some States have had to increase payments to these providers as a result of these judicial interpretations [¶]. It is the Committee's intention that, following enactment of this Act, neither this nor any other provision of Section 1902 [of the Social Security Act, codified as 42 U.S.C. § 1396a] will be interpreted as establishing a cause of action for hospitals and nursing facilities relative to the adequacy of rates they receive.

H.R. Rep. No. 105-149, at 590-91 (1997).[1]

The other provision the United States points to is the so-called *Suter* fix, which demonstrates that a private right of action would be available to enforce provisions relating to state plans if the case satisfied the § 1983 or implied-right-of-action standards. *See* Brief for United States 29-30. *Amici* Former HHS Officials assert, however, that the legislative history of amendments to the Medicaid Act demonstrates congressional intent that providers would be able to compel state compliance with various provisions.

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[1] *Amici* Former HHS Officials assert that § 30(A) is "structurally similar" to the Boren Amendment and so under *Wilder*'s rationale, § 30(A) "accords rights for providers to vindicate through the Supremacy Clause." Brief for Former HHS Officials 12. The text of the two provisions and the committee report associated with the repeal of the Boren Amendment do not support this position, and anyway, Respondents have never argued that § 30(A) confers enforceable rights.

Brief for Former HHS Officials 9. They quote a 1981 House committee report as saying that "Of course, in instances where the States or the Secretary fail to observe these statutory requirements, the courts would be expected to take appropriate remedial action." Brief for Former HHS Officials 10. But the sentence immediately preceding the quoted one refers to "Plan changes *that would affect the rights of Medicaid beneficiaries or participating providers*," H.R. Rep. No. 97-158, 301 (1981) (emphasis added), which indicates that "appropriate remedial action" may have been anticipated where "rights" were at issue. Of course here, privately enforceable rights are not at issue.

4. Finally, Respondents and *amici* Former HHS Officials argue that private enforcement is necessary because HHS does not have the horsepower to enforce Medicaid statutes and the remedy of funding withdrawal is inadequate. Brief for Respondents 40 ("Preemption actions are also necessary in light of CMS's limited resources"; "defunding penalty would harm the very low income beneficiaries that the Medicaid Act seeks to protect"); Brief for Former HHS Officials 14-19. There are two basic problems with these arguments. First, Respondents cite no cases to suggest that a perceived lack of agency resources – a matter for Congress and the President to resolve – determines whether a statute is enforceable. Second, the complaints about the adequacy of the funding-withdrawal remedy are misplaced. The ultimate penalty of funding withdrawal occurs only after negotiation between CMS and the state fails to

produce a mutually acceptable solution. Medicaid is, after all, a cooperative program where states provide care with financial assistance from the federal government. Neither Respondents nor their *amici* have demonstrated that the consequence of funding withdrawal occurs regularly. In reality, most issues are resolved before it ever gets that far.

III. An Equitable Preemption Cause Of Action Under The Supremacy Clause Is Inconsistent With This Court's Preemption Cases

1. The Supremacy Clause does not, by itself, authorize private plaintiffs to enforce federal statutes against state officials. It is not a source of any rights (something Respondents do not seem to dispute). *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979). Rather, the purpose of the Supremacy Clause is "to ensure that, in a conflict with state law, whatever Congress says goes." *Indep. Living Ctr.*, 132 S. Ct. at 1211 (Roberts, C.J., dissenting). And Petitioners do not dispute, as the United States points out, the Court's "longstanding practice of entertaining suits by private parties in federal court to enjoin state regulation of primary conduct as to which the plaintiffs claim immunity under federal law." Brief for United States 18. The question is not whether the Court *may* entertain preemption cases, but *how*. Brief of National Governors Ass'n 25. Just because the Supremacy Clause resolves a dispute between state and federal law does not mean that any

plaintiff may invoke the Court's equitable powers and seek injunctive relief. The simple allegation of a conflict between state and federal law is not enough: Preemption cases "involve[e] 'the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law.'" *Indep. Living Ctr.*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting), *quoting Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring). Preemption cases, then, involve anticipatory defenses to state laws that interfered with conduct that was, by virtue of the Supremacy Clause, properly free of state regulation.

The Court explained this operation of the Court's equitable powers in *Morales v. Trans World Airlines*, 504 U.S. 374 (1992). There, plaintiffs challenged Texas' consumer protection statutes prohibiting allegedly deceptive airline fare advertisements as preempted by the Airline Deregulation Act. *Id.* at 383. A threshold question was whether the district court could award injunctive relief. Relying on *Ex parte Young*, 209 U.S. 123 (1908), the Court said it could:

> Like the plaintiff in *Young*, then, respondents were faced with a Hobson's choice: continually violate the Texas law and expose themselves to potentially huge liability; or violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review.

Id. at 381.

2. Respondents contend that this is all wrong; their case may proceed as a proper exercise of the federal courts' equitable powers to enforce the Supremacy Clause irrespective of whether there is any federal right at stake or any anticipatory defense to assert. The only requirement a plaintiff alleging preemption must satisfy, they argue, is injury. Brief for Respondents 7, 12-13. The Court, they argue, has "routinely entertained Supremacy Clause preemption cases when the plaintiffs faced no possible threat of enforcement or regulatory proceedings." Brief for Respondents 21. The cases they rely on as evidence of their rule read differently than Respondents suggest. *American Trucking Assn's, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013), for example, involved contracts between Los Angeles's Port and trucking companies. Those contracts contained numerous requirements, but were no mere contracts: They "function[ed] as part and parcel of a governmental program wielding coercive power over private parties, backed by the threat of criminal punishment." *Id.* at 2103. That the criminal sanctions were aimed at the terminal operators, rather than the trucking companies themselves does not mean the case was not the typical preemption case. The contracts regulated the primary conduct of the trucking companies in a way that was allegedly preempted by federal law and imposed penalties for noncompliance. *Id.* at 2100.

As more evidence of their rule at work, Respondents provide with their brief an appendix listing 57 cases that they say demonstrates the Court has

routinely entertained preemption cases where there was no possibility the plaintiff would have faced state or local regulatory or other enforcement proceedings. These cases do not aid their position either. In fact, they support the view that preemption serves to permit the assertion of an anticipatory defense – something Respondents do not assert in this case.

The appendix purports to list opinions in which this Court "decided claims for injunctive or declaratory relief initially brought in federal court against implementation of a state or local law on the ground that the law was preempted under the Supremacy Clause" and whether the claims "were not brought under 42 U.S.C. § 1983" or "appear" to "contain the type of 'rights-creating' language necessary to satisfy the test set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002)." Brief for Respondents 1a. The appendix in these Respondents' brief is remarkably similar to the appendix submitted by the *Dominguez* respondents in *Independent Living Center*. *See* Brief for *Dominguez* Respondents in No. 09-1158, 2011 WL 3319552 (Jul. 29, 2011). In *Independent Living Center*, the appendix identified 61 cases; here, it identifies 57 despite the inclusion of three opinions issued in the interim.[2]

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[2] Omitted are *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12 (2007) ("We have 'interpret[ed] grants of both enumerated and incidental "powers" to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law.'"); *Arkansas Department of Health & Human*

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The vast majority of the appendix cases represent the anticipatory defense paradigm. *See* Nos. 1, 2, 4-7, 9-12, 14, 16-17, 20-41, 43-51 (44 cases). Interspersed among this cases are decisions involving application of express preemption provisions – particularly section 514 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a) – that arguably reflect Congress's intent to provide an actionable statutory right to be free of conflicting state regulation. *See American Trucking Ass'n* (Federal Aviation Administration Authorization Act ("FAAAA")); *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008) (FAAAA); *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003) (ERISA); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997); *California Div. of Labor Standards*

Services v. Ahlborn, 547 U.S. 268 (2006) (suit to enforce 42 U.S.C. § 1396p, which prohibits states from imposing a lien "against the property of any individual prior to his death."); *Building & Construction Trades Council of Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 125 (1993) (rights enforceable through § 1983); *Brown v. Hotel & Restaurant Employees & Bartenders Local 54*, 468 U.S. 491, 501 (1984) ("[S]tate law which interferes with the exercise of these federally protected rights . . . is preempted."; *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 281 (1977) (federal license "transfer[s] to the licensee 'all the right' which Congress has the power to convey."); *Java*, 402 U.S. 121 (1971); and *Cummings v. City of Chicago*, 188 U.S. 410 (1903) ("The controlling question . . . is whether the plaintiffs have the right, in virtue of certain legislation of Congress and of certain action of the Secretary of War . . . to proceed with the proposed work. . . "). These omissions may reflect a determination that these cases did involve rights protectable in the federal courts.

Enforcement v. Dillingham Constr., N. Am., Inc., 519 U.S. 316 (1997); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

Other cases involve discrete matters committed specifically to federal regulation by constitutional provisions that may provide an independent basis for suit without regard to the Supremacy Clause. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013) ("[b]ecause the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent"); *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) ("[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens").

A set of older cases held private actors to be "federal instrumentalities" immune from state and local taxation, a *sui generis* category of constitutional jurisprudence that did not trigger the need for a Supremacy Clause-based claim for relief. *Clallam County v. United States*, 263 U.S. 341 (1923); *Choctaw, Okla., & Gulf R.R. Co. v. Harrison*, 235 U.S. 292 (1914); *Railway Co. v. McShane*, 89 U.S. (22 Wall.) 444 (1874); *Union Pac. R.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873). The federal instrumentality doctrine was premised on the complainant taxpayer's

relationship to the United States by contract or lease and extended to the taxpayer the federal government's immunity from state taxation by virtue of its sovereign status. The federal doctrine had a state instrumentality corollary with respect to federal taxation – a fact underscoring that the federal common law-bestowed immunity, not the Supremacy Clause, provided the "right" being enforced. This Court severely and identically limited both instrumentality doctrines in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 386-87 (1938). The decision in *Osborn v. Bank of United States*, 22 (9 Wheat.) 738 (1824), is of a piece. *Id.* at 867 ("[i]f the trade of the Bank be essential to its character, as a machine for the fiscal operations of the government, that trade must be as exempt from State control as the actual conveyance of the public money").

To be sure, there are several decisions that are not so neatly characterized. In *Pharmaceutical Research and Manufacturers v. Walsh*, 538 U.S. 644 (2003), this Court entertained a challenge to a preliminary injunction that restrained enforcement of a state statute imposing a prior authorization requirement under the Maine Medicaid program for drugs manufactured by a company that declined to enter into rebate agreement. *Id.* at 653-54. Maine, while challenging before the court of appeals the pharmaceutical association's standing to maintain the action under the federal Medicaid Act (*Pharmaceutical Research and Manufacturers v. Concannon*, 249 F.3d 66, 73 (1st Cir. 2001), *aff'd*, 538 U.S. 644 (2003)), did

not raise the question whether a Supremacy Clause-based right of action existed (even if on the merits it failed) before this Court. Justice Thomas alone addressed that issue in his concurring opinion. 538 U.S. at 682-83. So, too, in *Foster v. Love*, 522 U.S. 67 (1997), where the Court invalidated a Louisiana statute deeming as elected any open primary candidate for a federal office who received more than 50 percent of the vote without need to appear on the national election day ballot, the defendant state officer did not dispute the existence of a right of action under the Supremacy Clause – the basis upon which the court of appeals had acted. *Love v. Foster*, 90 F.3d 1025, 1032 n.8 (1996), *aff'd*, 522 U.S. 67 (1997). No more helpful is *Rosado v. Wyman*. There, this Court held that New York violated the Social Security Act by the method used by the State to calculate welfare benefits. *Id.* at 417. Because it agreed with the district court that pendent jurisdiction existed over "this statutory claim," the Court found "no occasion" to determine whether jurisdiction existed under 28 U.S.C. § 1331, given its then $10,000 amount-in-controversy requirement, or 28 U.S.C. § 1343(3). 397 U.S. at 405 n.7; *see Rosado v. Wyman*, 304 F. Supp. 1356, 1362 (E.D.N.Y.) (finding "no doubt" that the "first requirement" of § 1331 jurisdiction was satisfied "since plaintiffs allege that the challenge[d] state statute violates the Social Security Act"), *rev'd*, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970)). The common denominator in these decisions is the absence of any discussion, other than in Justice Thomas's concurrence, of

whether the Supremacy Clause itself provided a substantive cause of action.

Of similar ilk is the *per curiam* opinion in *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1996), that reversed, as inconsistent with the 1994 Hyde Amendment (Pub. L. No. 103-112, § 509, 107 Stat. 1082, 1113 (1994)), a "blanket invalidation" of an Arkansas statute prohibiting the use of state funds to pay for abortions other than to save the mother's life. This Court did not address the question whether the Supremacy Clause provided an independent basis for the exercise of § 1331 jurisdiction. The Eighth Circuit had concluded that the plaintiffs could "enforce the Medicaid statute, as amended by the Hyde Amendment, through 42 U.S.C. § 1983." *Little Rock Family Planning Servs., P.A. v. Dalton*, 60 F.3d 497, 502 (8th Cir. 1995), *rev'd*, 516 U.S. 474 (1996).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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